

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

1
BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,943

Robert Roberts, Jr.,

Appellant,

v.

United States of America,

Appellee.

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 29 1967

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STATEMENT OF QUESTIONS PRESENTED

I. Whether a convicted felon sentenced to ten to thirty years in prison and thereafter adjudged mentally ill has become subjected to cruel and unusual punishment in violation of the Eighth Amendment of the Constitution because his mental condition does not permit him to conduct himself in a manner consistent with that which would make him eligible for parole, thus in effect giving him a status which extends his punishment to a minimum of thirty years imprisonment rather than ten years.

II. Whether a convicted felon sentenced to ten to thirty years in prison and thereafter adjudged mentally ill has become subjected to cruel and unusual punishment in violation of the Eighth Amendment of the Constitution because his mental condition does not permit adjustment to his prison sentence thus forcing a cycle of incarceration in a hospital for the mentally ill and return to prison and denying him adequate treatment for his mental condition.

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JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia denying the relief requested by Appellant in his motion to set aside and vacate his sentence pursuant to 28 U.S.C. §2255. This Court has jurisdiction of this appeal under 28 U.S.C. §1291.

STATEMENT OF THE CASE

Appellant was sentenced by the United States District Court for the District of Columbia on December 18, 1959, to ten to thirty years after having been found guilty of rape, robbery and sodomy. In November, 1961, Appellant was removed from Lorton Reformatory for the purpose of a mental examination and was subsequently certified by Dr. David A. Lanham of the Legal Psychiatric Services to be in need of treatment for a mental illness: schizophrenic reaction, paranoid type. Pursuant to Title 24, District of Columbia Code §302, defendant was transferred for treatment to St. Elizabeth's Hospital on January 9, 1962, where the diagnosis of schizophrenia was confirmed.

Appellant remained in St. Elizabeth's until February, 1964, when the hospital certified that he was sufficiently recovered from his mental illness to be returned to Lorton Reformatory. About one year after his return, Appellant, according to the records of Lorton Reformatory, was observed to have smeared the walls of his cell with his feces and did not

respond to efforts of communication. Appellant was once again referred to Legal Psychiatric Services where he was diagnosed as suffering from schizophrenic reaction, paranoid type, the same illness for which he was earlier committed to St. Elizabeth's Hospital. He was thereafter recommitted to St. Elizabeth's Hospital where he remains today under the continuing diagnosis of schizophrenic reaction, paranoid type.

Appellant had filed motions pursuant to 28 U.S.C. §2255 to vacate his sentence and for order of a new trial on January 28, 1961 (Cr. 682-59), October 4, 1962 (Cr. 682-59), December 10, 1962 (Cr. 682-59), October 31, 1963 (C.A. 2680-63) and April 1, 1966 (C.A. 875-66). All of these motions were denied as were his requests for leave to appeal such denials in forma pauperis. Appellant's petition for a writ of habeas corpus on December 22, 1961 (H.C. 347-61) was also denied.

On September 6, 1966, Appellant filed another motion under 28 U.S.C. §2255 to vacate and set aside his sentence or to hold a hearing or to reduce the sentence imposed. This motion was denied as frivolous by the District Court and leave to appeal in forma pauperis was also denied. This Court granted such leave on November 29, 1966, and ordered Appellee to show cause why the judgment of the District Court should not be reversed and the case remanded for an evidentiary hearing on Appellant's allegation of incompetency to stand trial. On January 18, 1967, this Court denied Appellee's motion for summary affirmance and the judgment of the District

Court was vacated and the case remanded for an "evidentiary hearing on appellant's present complaint or on such amended complaint as counsel for appellant may file." Appellant filed an amended motion in the District Court on March 28, 1967.

An evidentiary hearing was held before the Honorable Judge George L. Hart, Jr., of the United States District Court for the District of Columbia on March 31, 1967, where Appellant was represented by Barbara Babcock, court appointed counsel. At the hearing, testimony was introduced seeking to support Appellant's allegations that he was incompetent to stand trial in 1959 and that his sentence as it is now being carried out constitutes cruel and unusual punishment in violation of the Eighth Amendment of the Constitution. The court found that Appellant was competent to stand trial in 1959 and that "the sentence given by this Court to the defendant was not a cruel and unusual punishment under the Constitution." The court therefore denied and dismissed Appellant's motion. Appellant is here appealing the decision of Judge Hart as it relates to his ruling on the sentence as not constituting cruel and unusual punishment. Appellant is not appealing that part of the decision relating to his competency to stand trial in 1959.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. The Constitution of the United States

A. Eighth Amendment:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

II. Statutes

A. Title 24, Section 302, District of Columbia Code (1967) provides:

"Any person while serving sentence of any court of the District of Columbia for crime, in a District of Columbia penal institution, and who, in the opinion of the Director of the Department of Corrections of the District of Columbia, is mentally ill, shall be referred by such Director to the psychiatrist functioning under section 24-106, and if such psychiatrist certifies that the person is mentally ill, this shall be sufficient to authorize the Director to transfer such person to a hospital for the mentally ill to receive care and treatment during the continuance of his mental illness."

B. Title 24, Section 303(b), District of Columbia Code (1967) provides:

"When any person confined in a hospital for the mentally ill while serving sentence shall be restored to mental health within the opinion of the superintendent of the hospital, the superintendent shall certify such fact to the Director of the Department of Corrections of the District of Columbia and such certification shall be sufficient to deliver such person to such director according to his request."

C. Title 21, Section 541(a), District of Columbia Code (1967) provides:

"(a) Proceedings for the judicial hospitalization of a person in the District of Columbia may be commenced by the filing of a petition with the Commission on Mental Health by his spouse, parent, or legal guardian, by a physician, by a duly accredited officer or agent of the Department of Public Health, or by an

officer authorized to make arrests in the District of Columbia.
The petition shall be accompanied by:

(1) a certificate of a physician stating that he has examined the person and is of the opinion that the person is mentally ill, and because of the illness is likely to injure himself or other persons if allowed to remain at liberty; or

(2) a sworn written statement by the petitioner that:

(A) the petitioner has good reason to believe that the person is mentally ill, and, because of the illness, is likely to injure himself or other persons if allowed to remain at liberty; and

(B) the person has refused to submit to examination by a physician."

D. Title 21, Section 542(a), District of Columbia Code (1967) provides:

"(a) The Commission shall promptly examine a person alleged to be mentally ill after the filing of a petition under section 21-541 and shall thereafter promptly hold a hearing on the issue of his mental illness. The hearing shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the mental health of the person named in such petition. In conducting the hearing, the Commission shall hear testimony of any person whose testimony may be relevant and shall receive all relevant evidence which may be offered. A person with respect to whom a hearing is held under this section may, in his discretion, be present at the hearing, to testify, and to present and cross-examine witnesses."

E. Title 21, Section 543, District of Columbia Code (1967) in part, provides:

"The alleged mentally ill person shall be represented by counsel in any proceeding before the Commission or the court, and if he fails or refuses to obtain counsel, the court shall appoint counsel to represent him."

F. Title 21, Section 544, District of Columbia Code (1967) in part, provides:

"If the Commission finds, after the hearing, that the person with respect to whom the hearing was held is mentally ill, and because of the illness is likely to injure himself or other persons if allowed to remain at liberty, the Commission shall promptly report that fact, in writing, to the United States District Court for the District of Columbia. * * * An alleged mentally ill person with respect to whom the report is made has the right to demand a jury trial, and the Commission, orally and in writing, shall advise him of this right."

G. Title 21, Section 545(b), District of Columbia Code (1967) in part, provides:

"If the court or jury finds that the person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty, the court may order his hospitalization for an indeterminate period, or order any other alternative course of treatment which the court believes will be in the best interests of the person or of the public."

STATEMENT OF POINTS

Appellant's sentence as now being implemented constitutes cruel and unusual punishment in violation of the Eighth Amendment. With respect to this Point, Appellant desires the Court to read the following pages of the hearing transcript: Tr. 31-41, inclusive; 46-56, inclusive; 65 third line from the bottom to 67 sixth line from the top.

SUMMARY OF ARGUMENT

I. Appellant contends that the sentence as it is now being carried out violates his rights to be free from cruel and unusual punishment as guaranteed under the Eighth Amendment. Testimony presented at the hearing clearly showed that Appellant is presently suffering from mental illness and that his conduct is related to that illness. Hearing Tr. 26, 31-36, 54-55, 66. Appellant will be ineligible for parole due to this conduct caused by his illness, thus requiring him to serve a sentence of thirty years. Because of Appellant's status as a mentally ill prisoner, he is effectively being subjected to cruel and unusual punishment in violation of the principles set forth in Robinson v. California, 370 U.S. 660 (1962). See also, Driver v. Hinnant, 356 F.2d 761 (1966), and Easter v. District of Columbia, 124 U.S. App. D.C. 36, 361 F.2d 50 (1966).

II. Appellant further contends that his sentence has in effect caused his mental illness forcing incarceration in a mental institution. Hearing Tr. 47, 49, 50, 54-46. All testimony adduced at the hearing indicated

that a return to prison would result in relapse of Appellant's mental condition. Hearing Tr. 36, 49, 66. Thus, defendant has been sentenced to what would appear to be a recurring cycle of incarceration in prison followed by a quick return to a mental hospital. Treatment at the hospital will also be limited due to his status as a prisoner committed to a mental hospital under D.C. Code 24-302. The sentence and punishment as now being implemented has thus become cruel and unusual in violation of the Eighth Amendment as it has caused and continues to cause Appellant to suffer a mental illness. Trop v. Dulles, 356 U.S. 86 (1958).

ARGUMENT

I. APPELLANT'S SENTENCE AS NOW BEING IMPLEMENTED CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT

A. Appellant's status as a mentally ill prisoner results in punishment more severe than is constitutionally permissible under the Eighth Amendment.

Appellant does not contend that the sentence as originally imposed constituted cruel and unusual punishment. The District Court in its ruling of March 31, 1967, felt that the "sentence given by this Court was not cruel and unusual punishment under the Constitution." Hearing Tr. 78. It is apparent that the court failed to gather the thrust of Appellant's argument. It is well recognized that a sentence within the statutory maximum does not per se violate the tenants of the Eighth Amendment. See, e.g.,

Perkins v. North Carolina, 234 F.Supp. 333 (W.D. N.C. 1964); Hutcher-son v. U. S., 120 U.S. App. D.C. 274, 345 F.2d 964 (1965), cert. denied, 382 U.S. 894 (1965). However, it is also established that in carrying out a sentence certain acts may constitute cruel and unusual punishment. Talley v. Stephens, 247 F.Supp. 683 (E.D. Ark. 1965) (physical treatment by prison officials); Sweeney v. U. S., 353 F.2d 10 (1965) (dictum) (probation conditions for chronic alcoholics); Fulwood v. Clemmer, 111 U.S. App. D.C. 184, 295 F.2d 171 (1961) (prejudicial treatment of prisoner). In light of these principles, it is Appellant's contention that the sentence as it is now being carried out under the present circumstances constitutes cruel and unusual punishment.

On the record Appellant's minimum sentence of ten years is a complete illusion. In fact, the original sentence of ten to thirty years undoubtedly has been usurped by one for thirty years. It is a recognized fact that parole is based on a prisoner's accrual of good conduct credits. A review of Appellant's records at the District of Columbia jail, Lorton Reformatory and St. Elizabeth's Hospital reveals that his attitude and conduct would not meet the standards of conduct required for accrual of good conduct credits. However, this conduct is clearly the product of his mental illness, paranoid schizophrenia. Hearing Tr. 31 to 36 sixth line from the bottom; 65 third line from the bottom to 66 tenth line from the bottom. Thus, Appellant's status as a prisoner adjudged mentally ill and

transferred to a hospital for treatment of paranoid schizophrenia under D.C. Code 24-302 undoubtedly results in imprisonment for thirty years without eligibility for parole. Any other conclusion would be in conflict with the record. Drs. Bukatman, Owens and Baughman all testified that if Appellant were transferred to Lorton Reformatory he would decompose and once again require commitment to St. Elizabeth's. Hearing Tr. 36, 48, 66. This decomposition would result in behavior and conduct inconsistent with the requirements for parole good time credit. "More frequently paranoid schizophrenia disposes to violence . . . Feeling that he is hounded relentlessly by persecutors from whom there is no escape, the patient is impelled to violence motivated by the desperation of self defense." Rome, Identification of the Dangerous Offender, 42 FRD 185, 190 (1967).

Punishment of an individual because of his status and particularly where that status is a recognized illness has been declared a violation of the rights guaranteed under the Eighth Amendment. Robinson v. California, 370 U.S. 660 (1962). This Court has recognized this principle in the area of chronic alcoholics in Easter v. District of Columbia, 124 U.S. App. D.C. 36, 361 F.2d 50 (1966). See also, Driver v. Hinnant, 356 F.2d 761 (1966). As Mr. Justice Douglass indicated in his concurrence in reversing the conviction of Robinson, "We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick

people to be punished for being sick." Robinson v. California, 370 U.S. at 678. Mr. Justice Fortas has also indicated his concern with punishment being inflicted because of illness. In his dissent from the Supreme Court's denial of certiorari in Budd v. California, 385 U.S. 909, 912-13 (1966), he states, "Our morality does not permit us to punish for illness. We do not impose punishment for involuntary conduct, whether the lack of volition results from 'insanity,' addiction to narcotics, or from other illnesses."

While these cases dealt with convictions in violation of the Eighth Amendment, surely it cannot be argued that the method and purpose of carrying out a sentence does not have to conform to these principles. As was indicated by Chief Justice Warren in Trop v. Dulles, 356 U.S. 86, 100 (1958), "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." Therefore, while a criminal has been justly and constitutionally convicted, he still "... has a moral claim upon the society which has condemned him: his humanity must be respected even while he is being punished. . . . To fail to treat him as a human being is to commit a new crime and to cause the shadow of guilt to fall on those who punish as well as on him who is punished." Note, 16 Stanford L. Rev. 996, 999-1000 (1964).

B. Appellant's inability to adjust to his imprisonment due to his mental illness has resulted in punishment inconsistent with the principles of the Eighth Amendment.

Appellant does not contend that his transfers to St. Elizabeth's under D.C. Code 24-302 were in violation of his rights guaranteed under the Constitution. However, there can be no question that his two transfers are indications of his inability to cope with a long term prison sentence. Hearing Tr. 47, 49, 50, 54-55, 56, 66. Thus, Appellant's sentence has become one of a probably recurring cycle of incarceration at Lorton followed by a return to St. Elizabeth's upon his decomposition. Surely the purpose for which statutes such as D.C. Code 24-302 have been adopted are not served by this continuing round of ineffectual attempts to aid and rehabilitate Appellant.

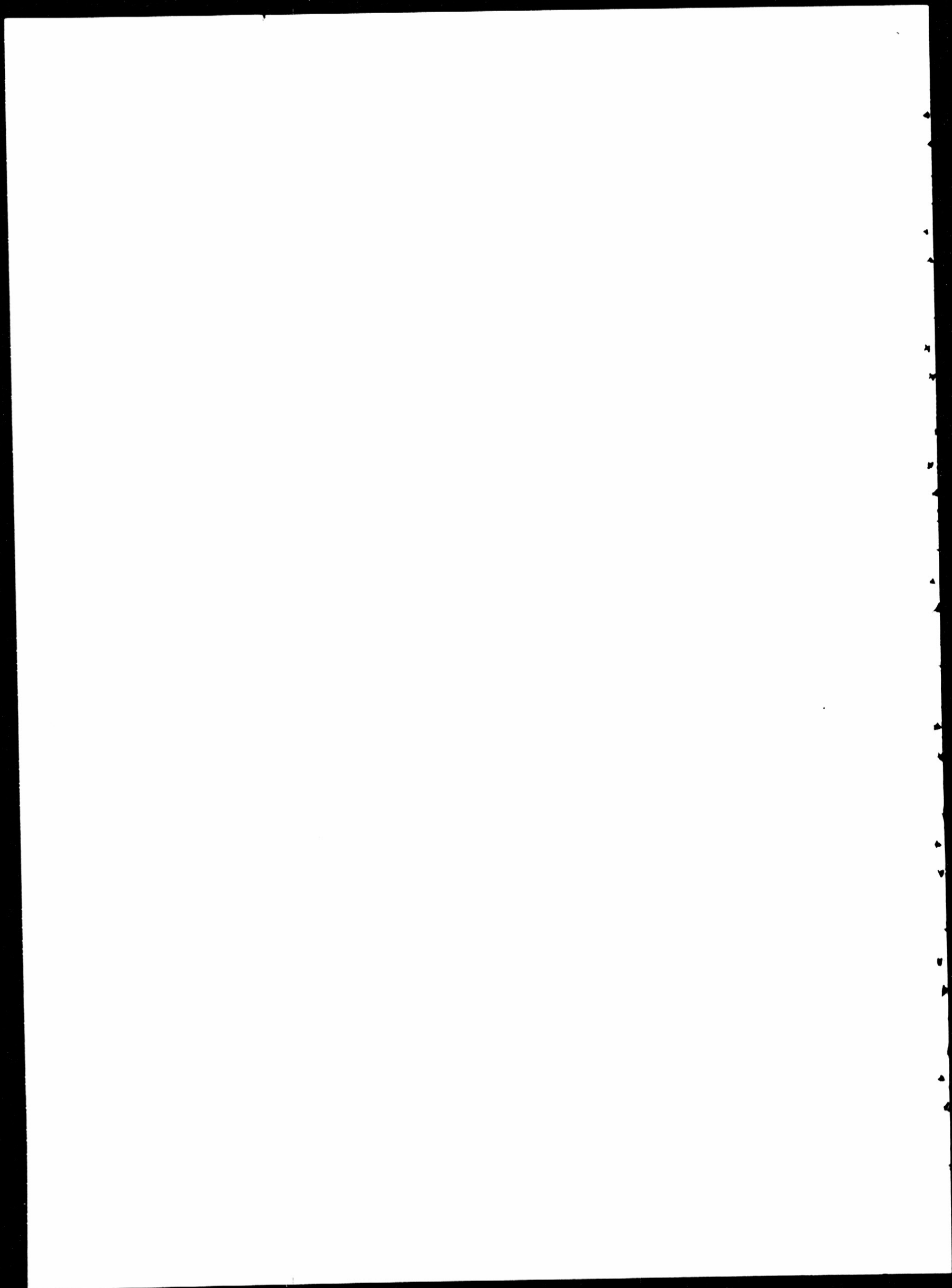
Punishment, while being served by incarceration in prison, cannot be effectuated by subjecting a prisoner to ". . . a fate of ever-increasing fear and distress." Trop v. Dulles, 356 U.S. at 102. If our courts are to be concerned with mental suffering from loss of "nationality" as being cruel and unusual punishment, then can it be said that they are not to be concerned if the administration of justice subjects an individual to a mental illness causing "fear and distress"? "While the state has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." Trop, supra, at 100.

The treatment afforded Appellant at St. Elizabeth's is expressly not the best available to one suffering from paranoid schizophrenia. If he is deemed to be somewhat cured, he must be retransferred to Lorton where, it is apparent, he will once again decompose thus forcing his return to the hospital. He is not eligible for a program of "limited return to the community" (Hearing Tr. 52), which is admittedly an accepted and recommended method of treatment. Hearing Tr. 40-41, 52. Nor is he permitted the freedom within the hospital which might be afforded if his condition improved and were he not a prisoner. Hearing Tr. 52. As a prisoner patient he will never be eligible for such release and yet if permitted to treat him adequately this is the recommended therapy. The records and transcripts are devoid of what, if any, treatment is being afforded Appellant under his present status and condition which might also raise questions under this Court's opinion in Rouse v. Cameron, 373 F.2d 451 (1966).

Since Appellant's sentence has become one of a recurring cycle of incarceration, mental decomposition and inadequate treatment, can it be argued that his punishment is not cruel and unusual under the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. at 101. This principle of an ever expanding application of the cruel and unusual punishment clause in a more enlightened and humane society has been recognized since the decision of Weems v. U. S.,

217 U.S. 349, 378 (1910). While Appellant's transfer and treatment under D.C. Code 24-302 is in accordance with a humane concern for his well being, ". . . [A] statute though 'fair on its face and impartial in appearance' may be fraught with the possibility of abuse in that if it is not administered in the spirit in which it is conceived it can become a mere device for warehousing the obnoxious and antisocial elements of society." Sas v. Maryland, 334 F.2d 506, 516 (1964). D.C. Code 24-302 cannot be administered effectively in the case at hand. This must be apparent in that approximately four years of Appellant's seven years of service has been spent at St. Elizabeth's with little hope of meaningful improvement. Mere treatment of the mentally ill prisoner ". . . does not relieve the bench and bar of the responsibility of endeavoring to reach at the earliest possible stage - ideally, prior to trial and sentence - the approach to a particular case which appears most just and appropriate, having regard to the individual's mental condition, his history, and the possibility of rehabilitating him and restoring him to usefulness in the community." Carter v. U. S., 109 U.S. App. D.C. 408, 283 F.2d 200, 203 (1960).

For the reasons indicated previously, Appellant contends that his sentence as now being carried out constitutes cruel and unusual punishment in violation of his rights guaranteed under the Eighth Amendment and requests that his sentence be set aside and vacated.



CONCLUSION

Appellant is mindful that the points asserted in this brief are both novel and without direct authority to support the views expressed therein. However, there is authority for the proposition that, "... a court will undertake to review the nature and conditions of a prisoner's otherwise lawful confinement." Harris v. Settle, 322 F.2d 908, 910 (1963), and cases cited therein. A review of the "nature and conditions" of Appellant's present confinement indicates a punishment now being inflicted that is cruel and unusual under the circumstances.

For these reasons, Appellant requests this Court to set aside and vacate his sentence. If such relief should be granted, Appellant can be detained and more adequately treated at St. Elizabeth's Hospital under Title 24, D.C. Code §§ 541-551. These sections have as one of their purposes the treatment of a mentally ill prisoner whose sentence is about to expire and whose release might be detrimental to himself and society. In the case at hand, vacation of Appellant's sentence followed by confinement and treatment under the D.C. Code sections mentioned above would be more humane and in conformity with the effective administration of criminal justice.

Respectfully submitted,

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November 29, 1967

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,943

ROBERT ROBERTS, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

FILED JAN 4, 1968

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QUESTIONS PRESENTED

In the opinion of appellee the following questions are presented:

1) Whether the District Court lacked jurisdiction in a § 2255 proceeding to set aside appellant's sentence on the ground that as administered and applied to appellant it violated the constitutional prohibition against cruel and unusual punishment.

2) Whether appellant's request that his sentence be set aside on the ground that he will be ineligible for parole by reason of his mental condition is premature where appellant, not having served his minimum sentence, is presently ineligible for parole.

3) Whether ineligibility for parole by reason of mental illness is a ground for setting aside a valid sentence.

4) Whether appellant, who is confined to a mental hospital and is receiving care and treatment, is being subjected to cruel and unusual punishment merely because, having been sentenced to a term of imprisonment, he is not entitled to limited release into the community.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,943

ROBERT ROBERTS, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A. Summary of proceedings

On November 18, 1959, appellant was convicted by a jury on a three-count indictment charging rape, robbery, and sodomy (22 D.C. Code §§ 2801, 2901, and 3502).¹ He was sentenced to imprisonment for a term of from ten to thirty years. Since commitment, appellant has

¹ Appellant's conviction was subsequently affirmed by this Court. *Roberts v. United States*, 109 U.S. App. D.C. 75, 284 F.2d 209, cert. denied, 368 U.S. 863 (1960).

filed numerous motions and petitions seeking to vacate and set aside his sentence.² The motion which initiated the proceeding from which this appeal arises was filed in the District Court on September 6, 1966. It is styled a petition for a motion to vacate and set aside sentence under 28 U.S.C. § 2255 and, in the alternative, a motion for a reduction in sentence. It contains numerous allegations none of which form a basis for the issue presented on this appeal.³

On September 6, 1966 the District Court dismissed appellant's petition as frivolous and on October 6, 1966 denied leave to appeal *in forma pauperis*. On November 28, 1966 this Court granted appellant leave to appeal *in forma pauperis*,⁴ and ordered appellee to show cause why the judgment of the District Court should not be reversed and the case remanded for an evidentiary hearing "on appellant's allegations that he was incompetent to stand trial." On January 18, 1967, this Court ordered the District Court to vacate its judgment dismissing appellant's petition as frivolous and instructed the District Court "to hold an evidentiary hearing on appellant's present complaint or on such amended complaint as counsel for appellant may file." *Roberts v. United States*, No. 20,615, order of January 18, 1967.

On March 28, 1967, through court-appointed counsel, appellant filed an amended § 2255 motion. He alleged, first, that he was incompetent when tried and convicted

² See the Government's "Motion for Summary Affirmance and Answer To Order To Show Cause Why the Judgment Should Not be Reversed and the Case Should Not be Remanded" filed in *Roberts v. United States*, No. 20,615.

³ Appellant alleged that his rights were violated in that he was not allowed to phone his attorney, was placed in a line-up, was not brought before a magistrate without unnecessary delay, was denied a transcript of his preliminary hearing, was improperly sentenced because the court was given an incomplete presentence investigation report, and was not guilty by reason of insanity.

⁴ *Roberts v. United States*, Misc. No. 2925, order of November 28, 1966.

in 1959 and, second, that he suffers from mental illness which is either aggravated or caused by prison conditions and the prospect of having to serve a maximum thirty year sentence. He argued in his amended motion, that because his sentence deprived him of an opportunity for limited release into the community thus restricting the range of available treatment for his mental illness, requiring him to serve his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment. Having been denied relief below, he does not press his claim of incompetency at trial here but argues only that his sentence as administered and applied to him constitutes cruel and unusual punishment.

B. The hearing.

On March 31, 1967, a hearing on appellant's amended § 2255 motion was held before Judge Hart. Appellant's mother testified that appellant had a "normal, usual childhood" until he was eight at which time his father was taken out of the home to answer for a manslaughter charge (Tr. 5). She stated that appellant became "very nervous and sick" immediately after his father's departure and for a two year period thereafter would wake up in the night crying for his father (Tr. 5-6). She further testified that following his father's departure appellant never seemed secure and wanted to be alone most of the time (Tr. 6-7). She said that appellant had two epileptic fits at age 13 or 14 (Tr. 8).

In answer to the court's questions, Mrs. Roberts stated that appellant, through childhood and when arrested on the rape charge, understood, "what was going on around him" (Tr. 14-15).

Rhetta Dillon, a clinical psychologist for the District schools, relying on school records testified that appellant, when he was age five and in kindergarten, was found to have superior intelligence and appeared mature (Tr. 17). But at age nine, so Mrs. Dillon testified, appellant "was

evaluated because of maladjustment" and was found to have dropped in intellectual potential from superior to average (Tr. 17-19).

After Mrs. Dillon testified, the court noted that Mrs. Dwyer, the attorney who represented appellant at trial, was not present and inquired of appellant's counsel whether Mrs. Dwyer was to be called and, if not, why not (Tr. 21). Counsel responded that she was not going to call Mrs. Dwyer because Mrs. Dwyer had informed her that she believed appellant was competent at trial (Tr. 22).

Appellant then called Dr. Barry Bukatman, a psychiatrist in private practice associated with Georgetown University. Dr. Bukatman testified that he saw appellant on three occasions, examining him for approximately five hours, and looked at the records at St. Elizabeths⁵ (Tr. 25). It was his opinion that appellant suffered from schizophrenia (Tr. 26). He thought appellant "understood quite well the charges against him" at trial but was not sure if appellant was able to cooperate with his attorney⁶ (Tr. 26-29). Acknowledging that the time lapse between the trial and his examination made it impossible for him to say what appellant's mental condition was at trial, Dr. Bukatman stated it was possible that appellant gave an impression of cooperating with his counsel but in fact was not⁷ (Tr. 30).

Appellant's counsel then sought to elicit from Dr. Bukatman an opinion of appellant's mental condition as reflected in the jail records. She said the jail records reflected numerous conduct violations; "fighting with an inmate, refusing to obey orders, destroying Government

⁵ It subsequently developed that appellant had been committed to St. Elizabeths on two occasions since he began serving his sentence.

⁶ Dr. Bukatman based his opinion on his observation that appellant had difficulty in dealing with authority figures (Tr. 29).

⁷ On cross, Dr. Bukatman said he found nothing to indicate that appellant lacked "a reasonable degree of rational understanding of what was going on" or "a rational as well as factual understanding of the proceedings" (Tr. 42).

property, destroying library books, agitating, lying, making false accusations against the officers and officials of the institution, refusing to work, possession of contraband, shirking work, taking food from the mess hall, insolent and lying" (Tr. 31). Citing these and other examples of appellant's inability to conform his conduct to prison discipline, she asked Dr. Bukatman if these incidents were related to appellant's mental disease (Tr. 32). Dr. Bukatman answered, "I would say it seems likely they are" (Tr. 32).

Appellant's counsel, referring to a letter dated March 1, 1965, then cited an instance where appellant complained about pain in his eye and having only one testicle and believing gas was escaping to his scrotum (Tr. 33). She noted that during appellant's first year of confinement at Lorton appellant had been on sick call 47 times and that appellant's complaints had been varied and "mostly unfounded" (Tr. 33-34). Dr. Bukatman observed: "Very frequently in this schizophrenic illness people feel they have marked physical changes and very frequently they are of such a bizarre nature as gas escaping in the scrotum. That is a very characteristic and typical finding" (Tr. 34).

Appellant's counsel, again referring to the letter dated March 1, 1965, said that appellant was observed by a prison psychiatrist holding his head to one side and having difficulty with his speech, stuttering, and complaining of auditory hallucinations (Tr. 34). The records showed evidence, so appellant's counsel stated, "of flight of ideas as well as looseness of association" (Tr. 34). She stated the records revealed that appellant "was extremely autistic" and that "he spoke about recently conversing with his dead sister" (Tr. 34). She described the records, dated December 21, 1961, of an interview by Dr. David Lanham of the Legal Psychiatric Services in which Dr. Lanham recorded that appellant related to him persecutory schemes directed against him by the Department

of Corrections (Tr. 35). Dr. Bukatman thought these incidents were symptomatic of schizophrenia (Tr. 35).

Appellant's counsel, continuing to refer to the jail records, noted that on January 27, 1965, appellant was found to have smeared his human waste on the wall of his cell. The records reflected that appellant did not respond when spoken to and seemed in a highly emotional state (Tr. 36). Dr. Bukatman replied this was "a sign of pretty severe mental illness" (Tr. 36).

Dr. Bukatman stated that he thought appellant, who was then confined at St. Elizabeths and whose mental disease was in a state of remission, would, if returned to Lorton, "become overtly psychotic again" (Tr. 36). He testified that one of the methods of treating schizophrenics is to release them into the community. He said that "some limited return into the community as soon as possible is a form of treatment which should be considered in every case" (Tr. 40-41).

Dr. David Owens, a staff psychiatrist at St. Elizabeths, testified that he examined appellant some time in 1962 after appellant was transferred from Lorton to St. Elizabeths,* and at that time it was his opinion that appellant was suffering from a "schizophrenic reaction, of the paranoid type" (Tr. 46-47). Dr. Owens acknowledged that it was his opinion at that time that appellant began to decompensate and suffered a psychotic reaction while under the psychological stress of being confined in prison with a long-term sentence (Tr. 47). He testified that appellant's condition in 1962 was a serious psychotic condition and that the incident which led to appellant's hospitalization in 1965—smearing his feces on his cell wall—could have been an acute psychotic episode (Tr. 48). He believed, as did Dr. Bukatman, that if appellant was sent back to Lorton he would decompensate again (Tr. 48-49).

Asked about treatment available to patients serving prison sentences, Dr. Owens replied that medication, in-

* Appellant was returned to Lorton in 1964 (Tr. 56).

dividual or group psychotherapy would not differ from that which is available to other patients but that, except in rare cases, a prisoner-patient would remain in a maximum security building (Tr. 51). He stated that a limited return to the community is a good method of treatment (Tr. 52). On cross, referring to appellant's mental condition, Dr. Owens testified that removal of appellant's sentence would not lead to appellant's recovery and that appellant could remain at the Hospital indefinitely (Tr. 56).

Dr. Owens said he could not give an opinion on whether appellant was competent to stand trial in 1959 but he did state that there was nothing in the records to indicate appellant's incompetency at that time (Tr. 55-56, 58). He said he thought appellant's "real problem started at Lorton" (Tr. 54). Noting that a lengthy prison sentence is a psychological stress on anyone, he said he based his opinion on the fact that appellant was not referred to St. Elizabeths until 1962, more than two years after appellant began serving his sentence (Tr. 54-55).⁹

The Government called Dr. Parle W. Baughman, Jr., a staff psychiatrist at St. Elizabeths Hospital. Dr. Baughman testified that he has known appellant since November, 1966 and that appellant was on his ward for about two months (Tr. 61). It was Dr. Baughman's opinion that appellant was suffering from a schizophrenic reac-

⁹ Dr. Owens testified (Tr. 55):

* * * I am assuming that he became ill while at Lorton because this looks similar to other cases we frequently see. The stress became so great, the worry about this lengthy prison sentence, serving time and so on and he was admitted to St. Elizabeths and there is a less stressful situation, a less confined atmosphere at St. Elizabeths and he showed improvement, which is again consistent with having become ill, with my theory of how he became ill. Then he got to the point that we felt he was well enough to be discharged and we sent him back to Lorton and he became ill again and he was returned to us under the stress. Now, I can't say with any real degree of certainty that this is what happened but this is what the records bear out.

tion, paranoid type (Tr. 63). Turning to the question of appellant's competence to stand trial in 1959, Dr. Baughman said he read the transcript of appellant's trial and found nothing to indicate that appellant was incompetent at that time. He stated that appellant appeared to be fully oriented as to time, place, and circumstance and that appellant's answers reflected that he understood the questions put to him (Tr. 63).

Dr. Baughman agreed with Drs. Bukatman and Owens that if appellant was returned to Lorton he might become psychotic again (Tr. 66). He said, however, to his knowledge the Hospital at the present time does not plan to return him to Lorton (Tr. 67).

Having heard this testimony, the court concluded that appellant "was competent to stand trial at the time of his original trial" and "that the sentence given . . . [appellant] was not a cruel and unusual punishment under the Constitution" (Tr. 77-78).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Eighth Amendment of this Constitution of the United States provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Title 28, United States Code, Section 2255 provides in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may

move the court which imposed the sentence to vacate, set aside or correct the sentence.

Title 24, District of Columbia Code, Section 302 provides:

Any person while serving sentence of any court of the District of Columbia for crime, in a District of Columbia penal institution, and who, in the opinion of the Director of the Department of Corrections of the District of Columbia, is mentally ill, shall be referred by such Director to the psychiatrist functioning under section 24-106, and if such psychiatrist certifies that the person is mentally ill, this shall be sufficient to authorize the Director to transfer such person to a hospital for the mentally ill to receive care and treatment during the continuance of his mental illness.

Title 24, District of Columbia Code, Section 303(b) provides:

When any person confined in a hospital for the mentally ill while serving sentence shall be restored to mental health within the opinion of the superintendent of the hospital, the superintendent shall certify such fact to the Director of the Department of Corrections of the District of Columbia and such certification shall be sufficient to deliver such person to such Director according to his request.

SUMMARY OF ARGUMENT

I

Appellant contends that his sentence, validly imposed, constitutes cruel and unusual punishment because of the manner in which it is administered and applied to him. Such a claim, however, is not within the jurisdictional range of 28 U.S.C. § 2255. Accordingly, the District Court lacked jurisdiction to entertain it.

II

Appellant argues that his sentence should be set aside on the ground that he will be ineligible for parole by reason of his mental illness. Not having served his minimum sentence and thus ineligible for parole, appellant is premature in urging such a ground as a basis for setting aside his sentence. Furthermore, even if his complaint of ineligibility for parole by reason of his mental illness is a basis for relief—and we do not think it is—it would not entitle appellant to have his sentence set aside but would, at best, entitle him, when eligible, to parole under appropriate conditions.

III

Confined to a mental hospital and receiving care and treatment, appellant argues that he is being subjected to cruel and unusual punishment because, having been sentenced to a term of imprisonment, he is not entitled to limited release into the community which might be of some therapeutic value to him. The Eighth Amendment's prohibition against cruel and unusual punishment strikes at punishments that involve torture, something inhuman and barbarous, punishment techniques which shock the moral sense of all reasonable men. Given his mental condition, appellant is serving his sentence under conditions which, in our view, do not even raise a substantial question under the Eighth Amendment.

ARGUMENT

- I. The District Court properly denied appellant's motion to vacate and set aside his sentence.

(Tr. 36, 46-49, 52, 55-56, 66-67)

Appellant argues that his sentence "as it is now being carried out under the present circumstances constitutes cruel and unusual punishment;"¹⁰ first, because he will

¹⁰ Appellant's Brief at 9.

be ineligible for parole by reason of his mental condition and thus will be required to spend more time in prison or hospital confinement than other prisoners not mentally ill,¹¹ and, second, because his sentence restricts the treatment available for his mental condition in that it denies him the opportunity for limited release into the community.¹²

First, we do not think the District Court had jurisdiction in the § 2255 proceeding to entertain the arguments urged here. And, second, we think appellant's arguments fail on the merits.

A. The District Court lacked jurisdiction in a § 2255 proceeding to set aside appellant's sentence on the ground that as administered and applied to appellant it violated the constitutional prohibition against cruel and unusual punishment.

Under 28 U.S.C. § 2255, appellant may attack his sentence only on grounds that it was imposed in violation of federal law, or that the sentencing court was without jurisdiction to impose it, or that it exceeded the maximum authorized by law, or was otherwise subject to collateral attack. Appellant relies on none of these grounds. Indeed, he concedes that his sentence as imposed does not violate the prohibition against cruel and unusual punishment.¹³ In short, he is not challenging his sentence through collateral attack but is contending that his sentence, validly imposed, constitutes cruel and unusual punishment because of the manner in which it is administered and applied to him. Such claim is beyond the jurisdictional range of § 2255. See *Costner v. United States*, 180 F.2d 892 (4th Cir. 1950); *Sanders v. United States*, 183 F.2d 748 (4th Cir. 1950), cert. denied, 340 U.S. 921 (1951); *Cruz Rivera v. United States*, 341 F.2d 746 (1st Cir.

¹¹ Appellant's Brief at 9-10.

¹² Appellant's Brief at 13.

¹³ Appellant's Brief at 8.

1965); see also *Sewell v. Kennedy*, 222 F. Supp. 15 (E.D. Va. 1963). Accordingly, the District Court had no jurisdiction to entertain it.

B. Not having served his minimum sentence and thus ineligible for parole, appellant is premature in requesting that his sentence be set aside on the ground that he will be ineligible for parole by reason of mental illness. In any event, ineligibility for parole by reason of mental illness would not entitle appellant to have his sentence set aside.

On December 18, 1959, appellant was sentenced to a term of from 10 to 30 years. He will be eligible for parole when he will have served the minimum sentence imposed;¹⁴ that is, at best, he will be eligible for parole on December 19, 1969.¹⁵ Thus, appellant's argument that his sentence should be set aside on the ground that he will be ineligible for parole by reason of his mental illness is premature.

Furthermore, if the Parole Board's determination that a prisoner is not eligible for parole is judicially reviewable—and we do think it is—a claim that the Board has improperly denied parole is not a basis for vacating and setting aside a sentence. *Cf.*, *Koptik v. Chappell*, 116 U.S. App. D.C. 122, 321 F.2d 388 (1963); *Richardson v. Rivers*, 118 U.S. App. D.C. 333, 335 F.2d 996 (1964); *Peterson v. Rivers*, 121 U.S. App. D.C. 327, 350 F.2d 457 (1965). If such a claim is a basis for any relief, it would, at most, entitle appellant, when eligible, to parole under appropriate conditions.¹⁶

¹⁴ See 24 D. C. Code § 205(a).

¹⁵ We are informed by the prison authorities that appellant's parole eligibility date is actually May 27, 1970 which is the result of his election not to serve while the appeal from his conviction was pending.

¹⁶ We do not address ourselves to the question of whether the Parole Board may deny appellant parole on the ground of mental illness because the Board has not done so.

C. Confined to a mental hospital and receiving care and treatment, appellant is not being subjected to cruel and unusual punishment merely because, having been sentenced to a term of imprisonment, he is not entitled to limited release into the community.

Appellant began serving his sentence on December 18, 1959. In 1962 he was sent to Saint Elizabeths Hospital pursuant to 24 D.C. Code § 302. He was at that time diagnosed as suffering from "schizophrenic reaction, of the paranoid type" (Tr. 46-47).

Dr. Owens was of the opinion that appellant began to decompensate and suffered a psychotic reaction in 1962 while under the psychological stress of being confined in prison with a long-term sentence¹⁷ (Tr. 47). He noted that at Saint Elizabeths, where there is "a less stressful situation," appellant improved (Tr. 55). Indeed, as Dr. Owens testified, the doctors at the Hospital "felt [appellant] was well enough to be discharged and . . . sent . . . back to Lorton . . ." some time in 1964 (Tr. 55).¹⁸ In January 1965, however, appellant was again referred to Saint Elizabeths for treatment after what could be termed "an acute psychotic episode"—smearing his feces on his cell wall (Tr. 36, 48). At the time the hearing was held below, appellant was confined at Saint Elizabeths, although his mental illness was in a state of remission (Tr. 36). The doctors agreed that, if appellant was returned to Lorton, he might decompensate again (Tr. 36, 48-49, 66). But according to Dr. Baughman, the Hospital authorities, at the time the hearing below was held, did not have present plans of returning appellant to Lorton (Tr. 67). And Dr. Owens expressed the opinion that appellant

¹⁷ Dr. Owens testified (Tr. 56):

* * * I would like to emphasize the fact that he has a sentence—I mean this doesn't cause a person to get mentally ill. To remove his sentence he is not going to recover * * *.

¹⁸ See 24 D.C. Code § 303(b).

could remain at the Hospital indefinitely "or as long as he is mentally ill and gets treatment" (Tr. 56). Dr. Owens testified that the only difference between the range of treatment available to appellant and that available to other patients is that, because appellant is confined pursuant to a prison sentence, he would remain in a maximum security building while other patients, as their condition dictated, would be given ground privileges and other options including limited release into the community (Tr. 52).

Appellant does not contend that he is denied care and treatment for his mental condition or that the treatment afforded him at Saint Elizabeths is not the result of a bona fide effort to cure or improve him.¹⁹ See *e.g.*, *Rouse*

¹⁹ Congress has made provision for the treatment of prisoners in the District of Columbia who, while serving a sentence, become mentally ill. Pursuant to 24 D.C. Code § 302 a prisoner who is mentally ill is to be transferred "to a hospital for the mentally ill to receive care and treatment during the continuance of his mental illness." See *Williams v. United States*, 114 U.S. App. D.C. 135, 140, 312 F.2d 862, 867 (1962), *cert. denied*, 374 U.S. 841 (1963); *Carter v. United States*, 108 U.S. App. D.C. 405, 283 F.2d 200 (1960). And in accordance with 24 D. C. Code § 303(b), a prisoner whose mental health is restored may be certified in good mental health and returned to prison. See *Bostic v. United States*, 112 U.S. App. D.C. 17, 20, 298 F.2d 678, 681 (1961).

We take it that 24 D.C. Code §§ 302, 303(b) do not permit hospital authorities to release prisoner-patients into the community. While 24 D.C. Code § 302 does not of its own terms require a prisoner-patient's confinement in the hospital, 24 D.C. Code § 303(b) speaks of persons "confined in a hospital." (Emphasis added). Furthermore, we think the statutory scheme providing for imprisonment of persons lawfully convicted of crime does not contemplate release into the community when a prisoner is confined at Saint Elizabeths pursuant to 24 D.C. Code § 302. So much was recognized in *Williams v. United States*, 114 U.S. App. D.C. 135, 140, 312 F.2d 862, 867 (1962), *cert. denied*, 374 U.S. 841 (1963), where the Court said:

We conclude that appellant's trial was free of prejudicial error and that his conviction must be affirmed. In so doing, however, we do not foreclose the possibility of a further inquiry, by the proper authorities, whether *his sentence should be served in the penitentiary or a mental hospital*. (Emphasis added).

Compare 18 U.S.C. § 4241 which provides for the transfer of fed-

v. *Cameron*, 125 U.S. App. D.C. 366, 371, 373 F.2d 451, 456 (1966); *Tribby v. Camerson*, — U.S. App. D.C. —, 379 F.2d 104 (1967). Relying on his mental illness, he argues that his sentence of from 10 to 30 years constitutes cruel and unusual punishment in that it restricts the range of treatment available to him because it denies him the opportunity for limited release into the community which, so the doctors testified, has therapeutic value.²⁰

The Eighth Amendment's bar on cruel and unusual punishment has not been the subject of an extensive body of interpretive rulings. As Chief Justice Warren noted in *Trop v. Dulles*, 356 U.S. 86, 99 (1958): "The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court." In writing for four of a majority of five and holding that deprivation of citizenship as punishment for wartime desertion was cruel and unusual, the Chief Justice observed (356 U.S. at 100):

eral prisoners, who while serving sentence become insane, to a mental hospital. That provision states that a prisoner transferred to a mental hospital is "there to be kept until, in the judgment of the superintendent of said hospital, the prisoner shall be restored to sanity or health or until the maximum sentence . . . shall have been served."

²⁰ Appellant also contends that the cycle of prison incarceration, decompensation, hospitalization, restored mental health, prison incarceration, and so on constitutes cruel and unusual punishment. Appellant's Brief at 12. We do not think appellant has made a factual showing to sustain this claim. As the testimony of the doctors indicates, at the time of the hearing there were no present plans for returning appellant to Lorton, and we think it fair to assume that the doctors will not return him to Lorton if in their judgment he cannot withstand the stress of prison confinement.

Furthermore, we do not think this complaint, if supported by the facts, and judicially cognizable, would entitle appellant to have his sentence set aside. At best, we think it would entitle appellant to an order permitting him to stay at the hospital. See *Rosheisen v. Steele*, 193 F.2d 273 (8th Cir. 1951); *Morton v. Steele*, 217 F.2d 12 (8th Cir. 1954), cert. denied, 348 U.S. 974 (1955); *In re Baptista's Petition*, 206 F.Supp. 288 (W.D.Mo. 1962), (all holding that the determination made pursuant to 18 U.S.C. § 4241 of whether a prisoner is to be kept in a mental hospital and what his medical needs are is judicially unreviewable). And see *Bostic v. United States*, *supra*; compare, *Rouse v. Cameron*, *supra*.

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.

The technique of punishment which appellant challenges here is imprisonment. It therefore is not "constitutionally suspect." It may be that imprisonment under some conditions may be so oppressive and cruel as to violate the Eighth Amendment.²¹ But not so here. The Amendment strikes at punishments that "involve torture or lingering deaths,"²² or "something inhuman and barbarous."²³ To be sure, "[t]he Amendment . . . draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,"²⁴ but its boundaries are broad.²⁵ It requires judicial invalidation of

²¹ Cf., *Kostal v. Tinsley*, 337 F.2d 845 (10th Cir. 1964), cert. denied, 380 U.S. 985 (1965); compare *Weems v. United States*, 217 U.S. 349 (1910); and see *Robinson v. California*, 370 U.S. 660, 675 (1962) (Justice Douglas concurring).

²² *In re Kemmler*, 136 U.S. 436, 447 (1890).

²³ *Weems v. United States*, 217 U.S. 349, 368 (1910).

²⁴ *Trop v. Dulles*, 356 U.S. 86, 101 (1958). In *Trop*, the Chief Justice stated that denationalization is "a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."

²⁵ One commentator has said (Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635, 636-37 (1966)):

The bar on cruel and unusual punishments found in the Eighth Amendment and almost all state constitutions was drawn from the English Declaration of Rights of 1688. In Stuart times, torture and barbarous punishments had been all too frequent, and the original provision was aimed directly at such practices. The principle was included in some colonial legislation and, after incorporation into most of the original

only those punishment techniques which "shock the moral sense of all reasonable men." Note, *Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635, 641 (1966); see *State v. Cannon*, 190 A.2d 514 (Sup. Ct. Del. 1963). As Justice Douglas recently put it: "The Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the 'cry of horror' against man's inhumanity to his fellow man." *Robinson v. California*, 370 U.S. 660, 676 (1962) (concurring opinion).

Against this background, we think appellant's argument is totally lacking in merit. The treatment he is receiving at St. Elizabeths can hardly be characterized as barbarous or inhuman. Confined at St. Elizabeths pursuant to valid sentence where he is receiving care and treatment for his mental illness, appellant is not subjected to a punishment that "shocks the moral sense of all reasonable men" simply because he is denied the opportunity for limited release into the community. Given his mental condition, appellant is serving his sentence under conditions which, in our view, do not even raise a substantial question under the Eighth Amendment.

state constitutions, was adopted as part of the Bill of Rights in 1791. Comment at that time indicates that the practices intended to be forbidden were punishments such as pillorying, disemboweling, decapitation, and drawing and quartering * * *.

See *Wilkerson v. United States*, 99 U.S. 130, 135-36 (1878) and *In re Kemmler*, 136 U.S. 436, 446 (1890) for gruesome examples of particular punishments at which the Amendment is aimed.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,943

Robert Roberts, Jr.,

Appellant,

v.

United States of America,

Appellee.

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 10 1968

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I. THE DISTRICT COURT HAD JURISDICTION IN A
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Under 28 U.S.C. § 2255, a prisoner in custody under a sentence of a court established by Act of Congress has the right to move the court which imposed the sentence to vacate, set aside or correct the sentence when that sentence is "subject to collateral attack . . ." (emphasis added). Appellant contends in his opening brief and herein continues to contend that the sentence imposed resulting in confinement in prison from ten to thirty years constitutes a cruel and unusual punishment because of the circumstances concerning Appellant's mental condition which have come to light since the imposition of his sentence.

Appellant is here collaterally attacking the very sentence itself which claim Appellee argues is beyond the jurisdictional range of § 2255. Appellee's Brief at 11-12. The sentence was imposed under circumstances which did not reveal the effect such a sentence with the resulting imprisonment would have upon Appellant's mental condition. Such circumstances have since come to light and in fact Dr. Owens testified that the confinement as a result of the sentence has caused the mental condition presently affecting Appellant. Hearing Tr. 54-55. If any sentence had been imposed under circumstances revealing that Appellant was then incompetent to stand trial, such sentence could unquestionably be collaterally attacked under

§ 2255. See Bostic v. U. S., 298 F.2d 678 (1961). Therefore, a sentence causing confinement which has resulted in a mental condition akin to incompetency and punishment which is cruel and unusual under the circumstances should also be subject to collateral attack under § 2255.

Although Appellee does not suggest what other avenue of relief Appellant might have sought, it would appear that a habeas corpus petition might have been his only other remedy. However, it is well recognized that § 2255 was adopted solely to relieve the administrative difficulties occurring under a system where a habeas corpus petition was the only remedy available to petitioners such as Appellant. As has been stated by the Supreme Court of the United States, "[T]he sole purpose [of § 2255] was to minimize the difficulties encountered under habeas corpus hearings by affording the same rights in another and more convenient forum." United States v. Hayman, 342 U.S. 205, 219 (1951), emphasis added. See also, Hill v. U. S., 368 U.S. 424 (1962).

Furthermore, in support of its allegation Appellee cites numerous cases (Appellee's Brief at 11-12), none of which are in point to support its present position. Costner v. U. S., 180 F.2d 892 (1950) and Sanders v. U. S., 183 F.2d 748 (1950) both involved a denial of relief under § 2255 because petitioners were there attacking treatment by prison authorities. Appellant here is not directly attacking the treatment he is receiving but is rather attacking the sentence causing confinement which results in placing

Appellant in a position incompatible with the tenets of the prohibition against cruel and unusual punishment. Relief under § 2255 was denied in Cruz Rivera v. U. S., 341 F.2d 746 (1965), solely because the record was deemed inadequate to raise an issue of fact as to petitioner's ability to understand the nature and seriousness of the charges at the time of his trial. Finally, nowhere in Sewell v. Kennedy, 222 F.Supp. 15 (1963), is there a mention of the application or interpretation of § 2255. Thus, Appellee has provided no authority for its position that Appellant's claim is beyond the jurisdictional range of § 2255.

II. APPELLANT'S SENTENCE AND CONFINEMENT
RESULT IN CRUEL AND UNUSUAL PUNISHMENT
NOTWITHSTANDING THE FACT THAT HE IS
PRESENTLY INELIGIBLE FOR PAROLE.

The basic contention of Appellant's opening brief was that his sentence resulting in imprisonment for ten to thirty years had become cruel and unusual punishment in light of the circumstances which now exist concerning his mental condition. Appellant's Brief at 7, 9. One of the points argued in support of this contention was that Appellant's mental condition has caused conduct in the District of Columbia jail, Lorton Reformatory and St. Elizabeth's Hospital inconsistent with those standards of conduct needed to make him eligible for parole at the earliest possible date. Appellant's Brief, at 9. Appellee argues that this contention is premature but nowhere refutes Appellant's contention that his status as a prisoner adjudged

mentally ill and transferred to a hospital for treatment of paranoid schizophrenia under D.C. Code § 24-302 results in imprisonment for thirty years without eligibility for parole in violation of the principles of Robinson v. U. S., 370 U.S. 660 (1962).

Under §§ 24-201c and 24-204 of the D.C. Code (1967), the Board of Parole may exercise its authority concerning parole of prisoners when there is a "reasonable probability that a prisoner will live and remain at liberty without violating the law . . ." and where such release would not be "incompatible with the welfare of society . . ." The examination of the records concerning Appellant's behavior while in prison and at St. Elizabeth's (Hearing Tr. at 31-32, 47-48, 66) clearly reveals a scheme of conduct which is inconsistent with the requirements set forth under D.C. Code §§ 24-201c and 204 and cannot make Appellant eligible for parole at any time other than when his maximum sentence would expire. The Parole Board could not grant parole within the tenets of the statutory requirements in light of Appellant's conduct and present condition. Yet, this conduct is unquestionably the result of those acts of Appellant which are caused by his mental condition. Appellant's Brief at 9. Thus, Appellant's sentence as it is forced to be carried out under these circumstances has become one of thirty years. Punishment inflicted because of a status created by involuntary conduct is constitutionally suspect under the Eighth Amendment as set forth in Robinson v. U. S., 370 U.S. 660 (1962).

Even if the Court should find that Appellant's argument concerning his parole status is premature, the fact that Appellant is not yet eligible for parole under normal circumstances is immaterial under the present circumstances. The relief requested is a vacation of the sentence as it now stands so that the tenets of the Eighth Amendment will not be violated. The continued existence of the sentence requiring long term prison confinement will result in the continual inability of Appellant to cope with such a sentence, thus effecting his present mental condition as a paranoid schizophrenic. To deny the relief requested for one more day, let alone two more years, on the grounds such request is premature as Appellee desires the Court to so rule, will no less result in cruel and unusual punishment. Appellant would still be facing the sentence which admittedly causes his paranoid schizophrenia. The sentence should thus be vacated by this Court regardless of the parole requirements in order to do substantial justice under the Eighth Amendment.

III. THE CONFINEMENT AS BEING IMPLEMENTED
UNDER APPELLANT'S SENTENCE CONSTITUTES
CRUEL AND UNUSUAL PUNISHMENT.

Appellee contends that since Appellant is not eligible for a program of limited return into the community as a prisoner patient committed to a mental hospital under D.C. Code § 302, he thus is not subjected to cruel and unusual punishment. Appellee's Brief at 14. Appellee also contends

that since at the time of the hearing Appellant's mental illness was in a state of remission, there was no plan to return Appellant to Lorton at that time and Appellant could remain at St. Elizabeth's indefinitely, he was thus not being subjected to punishment which is "inhuman or barbarous" or "shocks the moral sense of all reasonable men." Appellee's Brief at 13, 14, 16, 17.

The evidence presented at the hearing clearly demonstrated that Appellant's inability to cope with a long term prison sentence will result in a recurring cycle of incarceration at Lorton followed by a return to St. Elizabeth's upon his decomposition. Appellant's Brief at 12. The fact that there was no present intention at the time of the hearing to return Appellant to Lorton (Hearing Tr. 67) does not change in any respect the probability that such a return would not be permanent in light of the past experience of Appellant's quick decomposition upon his return in 1964. There was no testimony presented at the hearing which would indicate that Appellant's condition might improve to a point where he could cope with a return to Lorton and the confines of prison. In the absence of such testimony, it can only be presumed that Appellant will probably remain at Lorton indefinitely.

Any degree of remission in Appellant's present mental condition cannot be looked upon as a sign of improvement when the testimony of Drs. Bukatman and Owens is examined in the whole. While Dr. Bukatman

testified that there was "a degree of remission at present" (Hearing Tr. 37), he also testified that the schizophrenic symptom of difficulty in dealing with authorities was still present (Hearing Tr. 37). Dr. Owens testified that as long as Appellant remained at St. Elizabeth's he would "make a very marginal adjustment . . ." (Hearing Tr. 49), and that when placed under sufficient stress at the hospital it caused "an exacerbation of his symptoms." Hearing Tr. 49.

Appellee seems to take comfort in the statement made by Dr. Owens that Appellant could remain at the hospital indefinitely "or as long as he is mentally ill and gets treatment." Appellee's Brief at 14. Appellee would thus have this Court view D.C. Code § 24-302 as a "device for warehousing the obnoxious and antisocial elements of society." Sas v. Maryland, 334 F.2d 506, 516 (1964).

An application of the therapeutic treatment of limited release into the community would unquestionably be of benefit to Appellant as a paranoid schizophrenic. Hearing Tr. 40-41, 52. The continued existence of the sentence demanding confinement denies Appellant the application of this effective treatment which is perhaps the sole treatment which may lead to his rehabilitation. The fact that his present treatment is not "barbarous or inhuman" (Appellee's Brief at 17) does not make his present confinement and sentence any the less cruel and inhuman where no meaningful improvement in his present condition can be demonstrated to have occurred to date.

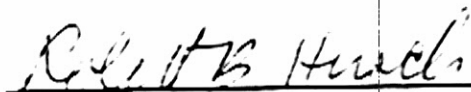
While Dr. Owens testified that mere removal of Appellant's sentence will not cause him to recover (Hearing Tr. 56), the removal of the sentence could result in more meaningful treatment which would hopefully be the first step in restoring Appellant's mental health and returning him to a position of usefulness in the community.

The exact scope of the Eighth Amendment has not been delineated in any opinion of the Supreme Court as Appellee readily admits. Appellee's Brief at 15-17. However, there can be no question but that treatment or imprisonment under circumstances which, though not involving torture or barbarous action, indicate a lack of respect for the "dignity of man" would be "constitutionally suspect." Trop v. Dulles, 356 U.S. 85 (1958). The treatment and punishment of criminal offenders by society has evolved to a position where those punishments which caused the adoption of the Eighth Amendment are no longer practiced. This does not mean that the courts must stop the process of evolution of constitutional interpretation in applying the rights guaranteed by the Eighth Amendment. While imprisonment may be a "traditional penalty," imprisonment under those circumstances which are set forth in the case at hand defy the "evolving standards of decency that mark the progress of a maturing society . . ." Trop v. Dulles, 356 U.S. 86, 101 (1958). Where a sentence results in imprisonment which slowly destroys the mind of an individual, it must be as "constitutionally suspect" as denationalization which destroys an individual's political existence.

CONCLUSION

Appellant requests this Court to grant him the relief requested on page 15 of his opening brief.

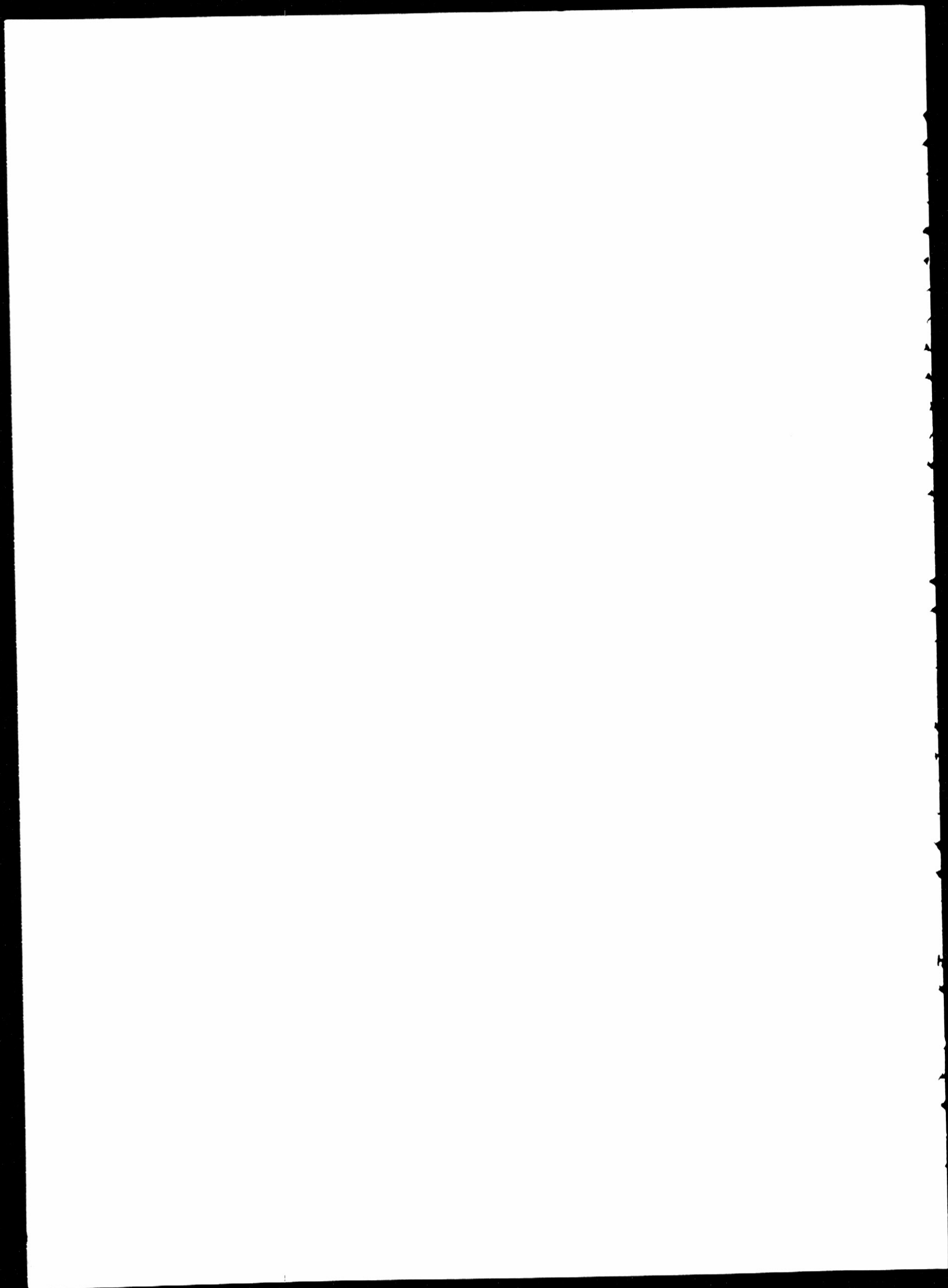
Respectfully submitted,



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January 10, 1968



CERTIFICATE OF SERVICE

The undersigned, court appointed counsel for Appellant, hereby certifies that on January 10, 1968, he made service of two (2) copies of the Reply Brief for Appellant to the following person at the address indicated:

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